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## Consenting to Sexual Activity

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# Chapter 9

## Caroline Derry

### Consenting to Sexual Activity

#### Abstract

This chapter explores how legal understandings of sexual consent have developed over fifty years. It begins with the immediate aftermath of *DPP v Morgan*,<sup>1</sup> which controversially placed the defendant's subjective perspective at the centre of criminal liability. Subsequent legal developments, leading up to and extending beyond the Sexual Offences Act are evaluated. The chapter asks why, despite a new, statutory definition of consent, the law on sexual consent remains highly contentious today. It explores possible answers through consideration of two particularly problematic areas – intoxicated consent and consent obtained by fraud – and asks whether the concept consent is adequate at all. Having examined the problems around the law on sexual consent, the chapter concludes by considering what the next steps might be.

#### 1. Introduction

The last half-century has seen an important shift in legal understandings of consent to sexual activity, largely prompted by feminist campaigns and critiques. Fifty years ago, violence against women had become a central issue for the women's liberation movement: Chiswick Women's Aid opened the first women's refuge from domestic violence in 1971, and the first Rape Crisis Centre opened in London in 1976.<sup>2</sup> Practical experiences combined with feminist theories informed calls for legal change, as when London Rape Crisis Centre submitted evidence to subsequent committees and commissions through the 1970s.<sup>3</sup> Sexual offences are an area of law where feminist critiques have had particular impact, but reforming the law has not resulted in straightforward progress.

While the legal definition of consent started to move away from a rigid requirement of 'force, fear or fraud' as early as the nineteenth century, fifty years ago it remained firmly focused upon the defendant's subjective view. The House of Lords decision in *DPP v Morgan* confirmed that a defendant's honest belief in consent, however unreasonable, would absolve him of criminal liability. Critical reaction to this case gave impetus to efforts to reform both the law and its application. These ultimately led to a new definition of consent in the Sexual Offences Act 2003 which aimed to transform understandings of consent in sexual relations. Nonetheless, shortcomings persist both in the legal provisions and in their implementation by the criminal justice system. Above all, the wider social and cultural context within which sexual activities are negotiated means that defining the boundaries of lawful consent remains highly

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<sup>1</sup> *DPP v Morgan* [1976] AC 182

<sup>2</sup> Felicity Kaganas, 'First Women's Refuge, 1971' in Erika Rackley and Rosemary Auchmuty (eds), *Women's Legal Landmarks: Celebrating the History of Women and Law in the UK and Ireland* (Oxford, Hart Publishing, 2019); Alison Diduck, 'First Rape Crisis Centre, 1976' in Rackley and Auchmuty, *Women's Legal Landmarks*.

<sup>3</sup> Diduck, 'First Rape Crisis Centre, 1976' 323.

contentious. This chapter examines how legal understandings of consent to sexual activity have developed, and the difficulties which persist.

## 2. The significance of consent

Sexual activity can be one of life's more enjoyable experiences, or one which causes physical and psychological injury, trauma, and distress. Between the extremes of joyful mutual consent and violent coercion are a vast and complex range of reasons for engaging in sex: a few examples include a sense of obligation, affection, curiosity, an attempt to become pregnant, coercion through threats, reluctant agreement to avoid provoking anger, altruism, hope of gaining some benefit from the other person, or an attempt to achieve popularity or self-worth. Its legal meaning is equally variable: a certain sexual act (penile penetration of the vagina) is a requirement for the validity of a marriage between a man and a woman.<sup>4</sup> Yet that same act can form the *actus reus* of rape: one of the most serious criminal offences carrying a maximum penalty of life imprisonment.<sup>5</sup> If similar physical acts can carry such very different personal, social, and legal meanings then how does the law differentiate between them?

It does so primarily through the notion of consent.<sup>6</sup> However, this chapter explores the ways in which consent is a surprisingly complicated concept dependent as much or more upon social and cultural norms as upon legal definitions. In England and Wales, the last half-century has seen an important shift in the law's understandings of consent to sexual activity, largely prompted by feminist campaigns and critiques. The criminal law's definition of consent has undergone profound change, although we will see that its implementation has not. Nor is the definition itself clear or straightforward, and the courts are still struggling to define its limits. To understand why consent continues to be such a complex and contested concept, we will explore these developments and their wider social context. We will end with a consideration of the key areas of difficulty and dispute today, including the question of whether the concept of consent itself is adequate.

It will be helpful to explain at the outset that consent underpins not one but two elements of most sexual offences. The absence of *actual* consent is necessary but not sufficient to make otherwise-lawful sexual activity a criminal act. There must also be an absence of *belief* in consent. A person who sexually touches someone who does not consent has committed the *actus reus* of an offence but will only be guilty if they also have *mens rea*, i.e. they did not believe the other person was consenting. Whether that *mens rea* should be subjective (dependent upon the defendant's own state of mind) rather than objective (requiring them to take reasonable care to ascertain consent) has been an important area of debate and development in the law and is considered in this chapter.

## 3. The rise in concern

Before 1994, rape was a wholly gender-specific offence: it could be committed only by males and only against females. It still requires penile penetration, but since the Criminal Justice and Public Order Act 1994 it has been gender-neutral as to victim.<sup>7</sup> Until 2003, there were two separate offences of indecent assault differentiated by the victim's sex,<sup>8</sup> but under sections 2 and 3 of the Sexual Offences Act 2003 both sexual assault by penetration and sexual assault are now gender-neutral offences. Nonetheless, the law's highly gendered history as well as

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<sup>4</sup> Section 12(1), Matrimonial Causes Act 1973. There is no equivalent requirement for marriage between people of the same sex (Marriage (Same-Sex Couples) Act 2013; section 12(2), Matrimonial Causes Act 1973).

<sup>5</sup> Section 1, Sexual Offences Act 2003.

<sup>6</sup> This chapter discusses consent in the context of sexual activity between adults. There are separate offences criminalising sexual activity with or between children, which are outside the scope of the chapter.

<sup>7</sup> Section 142(1) provided, 'It is an offence for a man to rape a woman or another man.' The *actus reus* was expanded to include penile penetration of the anus as well as the vagina.

<sup>8</sup> Sections 14 and 15, Sexual Offences Act 1956.

the fact that these offences are overwhelmingly committed by males, with females the majority of victims, mean that understandings of consent are profoundly gendered.<sup>9</sup>

Fifty years ago, the criminal law's understanding of rape away had already moved away from its origins as a property crime against husbands or fathers. A corresponding legal shift from a requirement of force to one of non-consent was already a century old;<sup>10</sup> although we will see that the shift was partial at best until the 1980s.<sup>11</sup> However, although sexual offences were now understood as a crime against women themselves, the law's approach remained rooted in notions of honour and marital value rather than sexual autonomy. Society, though, was changing drastically: the 1960s had seen the rise of both the sexual revolution and the women's liberation movement. While the two differed in fundamental ways about many aspects of women's sexuality, both challenged the notion that it should only be expressed within marriage and that women's value was intimately connected to their chastity. When feminists shared their experiences of sexual violence, they identified it as a large and hidden problem. Speaking out about it, campaigning and protesting, and establishing support services were crucial, but *Morgan* focused feminist attention on the need for better legal responses as well.

A culture of disbelief in the legal system was recognised as one of the key issues facing women who had experienced sexual violence. It was rooted not only in myths about women's sexuality but also in the law's focus upon men's experiences and subjectivities. The priority given to these in the substantive law on consent, particularly the question of a defendant's belief in consent, came under severe scrutiny following the House of Lords decision in *Morgan*. Their Lordships held that an honest belief that the victim had consented would lead to acquittal, no matter how unreasonable that honest belief might be. While those defendants' convictions were upheld on the basis that they could not have had an honest belief, the facts involved considerable exercise of force against the complainant as well as her verbal and physical resistance. Notions that absence of consent only existed where there was 'force, fear or fraud' still lingered, with Lord Hailsham accepting 'force' as a requirement of the *actus reus*.<sup>12</sup> Thus the feminist response to *Morgan* extended to scrutiny of the law's myths about consent as a whole, and their effect upon all aspects of the criminal justice system's response to sexual offences, from police treatment of initial reports to judges' sentencing remarks. It encompassed not only cultural attitudes about 'real rape'<sup>13</sup> but also those myths given the status of law.<sup>14</sup> Thus the outrage which greeted the House of Lords decision in *DPP v Morgan* was not simply at the *ratio decidendi*, problematic as that was, but also at the wider legal and social cultures which informed it.

The reactions to this decision prompted the Home Secretary to establish the Heilbron Committee; its chair, Rose Heilbron QC, was the first woman judge. However, while the Heilbron Report led to important changes in other areas, it did not advocate a change in the

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<sup>9</sup> For example, in the year ending March 2016, 90% of victims of rape and 84% of victims of other sexual offences recorded by police were women: Office for National Statistics, 'Experimental statistics: Victims of police recorded violent and sexual offences', 2017, <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/compendium/focusonviolentcrimeandsexualoffences/yearendingmarch2016/experimentalstatisticsvictimsofpolicerecordedviolentandsexualoffences#how-are-victims-and-suspects-of-violent-offences-related> (accessed 26 November 2019).

<sup>10</sup> *R v Camplin* (1845) 1 Cox CC 220.

<sup>11</sup> Sjolín cites the 38<sup>th</sup> (1973) edition of Archbold Criminal Pleading Evidence and Practice, for example, as still including reference to this requirement (Catarina Sjolín, 'Ten Years on - Consent under the Sexual Offences Act 2003' [2015] *Journal of Criminal Law* 20, 20.)

<sup>12</sup> See Lord Hailsham in *DPP v Morgan*, p 210.

<sup>13</sup> Jennifer Temkin, 'And Always Keep A-hold of Nurse, For Fear of Finding Something Worse': Challenging Rape Myths in the Courtroom' (2010) 13(4) *New Criminal Law Review* 710; Joanne Conaghan and Yvette Russell, 'Rape Myths, Law, and Feminist Research: 'Myths about myths'' (2014) 22 *Feminist Legal Studies* 25.

<sup>14</sup> For example, the legal fiction that a woman gave irrevocable consent to sexual intercourse with her husband on her wedding day, and therefore could not in law be raped by him, survived until 1991: *R v R* [1991] UKHL 12.

legal tests for belief in consent.<sup>15</sup> Nor did it spend a lot of time on the actus reus of consent, but it did review the then-current law and emphasise that there was no longer a requirement of physical force.<sup>16</sup> The Sexual Offences (Amendment) Act 1976 gave effect to some of the Report's recommendations, including that there should be a statutory definition of rape for the first time, emphasising lack of consent rather than violence.<sup>17</sup> Section 1 defined the offence as sexual intercourse 'without consent' where the defendant had been 'reckless' as to consent: in line with the Report's comments, there was no reference to the requirement of 'force, fear or fraud'.

The need for force was finally explicitly rejected in *Olugboja*.<sup>18</sup> In response to defence arguments that force or the threat of force was required to vitiate consent, Dunn LJ asserted that 'every consent involves a submission, but it by no means follows that a mere submission involves consent.'<sup>19</sup> Yet this was a partial and problematic advance in the law. The equation of 'reluctant acquiescence' with consent was very far from a model of positive consent.<sup>20</sup> Instead, it drew explicitly upon the model of men's sexuality as active and dominant, women's as passive and requiring 'seduction' into 'submission'. It blurred the lines between persuasion and coercion, cast women who actively sought or encouraged sexual activity as abnormal, and implicitly represented same-sex activity as deviant. In other words, it reaffirmed many of the problematic elements of legal understandings of consent.

#### 4. The Sexual Offences Act 2003: continuing controversies

The development of sexual offences law to this point could be characterised as evolution or, less generously but perhaps more accurately, as a series of piecemeal reforms. On either view, it lacked consistency and clarity not only between offences but also as to its underlying principles. The liberal principles which informed many changes from the Sexual Offences Act 1967 onwards sat uneasily alongside the moralistic elements of the law. Feminist pressure for law reform had not decreased in the years since *Morgan*: on the contrary, both the law and the legal process had come under systematic criticism.<sup>21</sup> Some feminist MPs who supported reforms had become government ministers following the Labour victory in the 1997 general election.<sup>22</sup> Further impetus for systematic reform came from the European Convention of Human Rights. This Convention was incorporated into domestic law by the Human Rights Act 1998, but the European Court of Human Rights had made it clear that the UK's discriminatory laws on sex between men breached the Article 8 right to private life.<sup>23</sup>

In response to these varied pressures, the government launched a major review of sexual offences, *Setting the Boundaries*.<sup>24</sup> The review set out its basic, liberal principles as non-discrimination, non-interference with consensual conduct, and personal autonomy, subject to the need to protect children and the vulnerable from coercion.<sup>25</sup> However, it left some key

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<sup>15</sup> Great Britain Advisory Group on the Law of Rape, and Rose Heilbron. *Report of the Advisory Group on the Law of Rape*. 1975.

<sup>16</sup> At paras 18-21.

<sup>17</sup> At para 81.

<sup>18</sup> *R v Olugboja* [1982] QB 323.

<sup>19</sup> At p 332.

<sup>20</sup> At p 331. For a summary of 'affirmative consent' models see Wendy Larcombe, 'Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Law' (2011) 19 *Feminist Legal Studies* 27, 30.

<sup>21</sup> Jennifer Temkin, *Rape and the Legal Process* (London, Sweet & Maxwell, 1984); Zsuzsanna Adler, *Rape on Trial* (London, Routledge, 1987); Sue Lees, *Carnal Knowledge: Rape on Trial* (London, Penguin, 1996).

<sup>22</sup> For example, the post of Minister for Women created in 1997 was held by Harriet Harman (also Social Security Secretary, and later Solicitor General), Lady Jay (also Leader of the House of Lords), and Patricia Hewitt (also Trade and Industry Secretary) in the period 1997-2003.

<sup>23</sup> *ADT v UK* [2000] ECHR 402, which challenged the criminalisation of acts between men which were not 'in private', narrowly defined as where only two people were present.

<sup>24</sup> Sexual Offences Review, *Setting the Boundaries: Reforming the Law on Sex Offences, Vol 1* (London, HMSO, 2000).

<sup>25</sup> *ibid* 1.3.

feminist concerns unaddressed. For example, it equated non-discrimination with gender neutrality, an approach with which not all feminists would agree in this highly gendered context.<sup>26</sup> For offences whose mens rea included a lack of belief in consent, it recommended that the subjective test of honest belief should remain.<sup>27</sup> However, it was to be limited by a requirement that the defendant 'take all reasonable steps in the circumstances to ascertain free agreement'.<sup>28</sup> The government, in its White Paper, proposed a test of 'reasonable belief' instead.<sup>29</sup> Despite this proving controversial in Parliament, where some legislators continued to favour the subjective test, the more objective approach was adopted in the final Act.<sup>30</sup> It avoids the awkward hybrid approach of *Setting the Boundaries* in favour of a simple mens rea requirement of lack of *reasonable* belief in consent.

The 2003 Act therefore abandoned the *Morgan* test. The mens rea for sexual offences including rape (section 1), sexual assault by penetration (section 2), and sexual assault (section 3) is now absence of a *reasonable* belief in consent.<sup>31</sup> In other words, it is more objective and requires the defendant to have taken appropriate steps to ascertain whether the complainant was consenting. While that contradicts the wider trend in criminal law for mens rea to be subjective, it is surely justified in situations where the means of ascertaining consent are so easily available: the other person can simply be asked.<sup>32</sup> However, it still leaves the courts to determine what is reasonable 'in all the circumstances', including which 'circumstances'<sup>33</sup> are relevant: a formulation which allows the courts to import subjective elements, a focus on the complainant's behaviour, and wider social attitudes into the test.

Consent as an element of actus reus also underwent significant reform. For the first time, consent now has a statutory definition. According to section 74, it is 'agreement by choice'; the person must have 'freedom and capacity' to make that choice. This definition aimed to remove all lingering assumptions that consent was present unless 'force, fear or fraud' could be demonstrated. Instead, it was supposed to be a positive (if not necessarily enthusiastic) agreement to the specific act. As *Setting the Boundaries* explained, 'One of the messages that had come to us in consultation was that consent was something that could be seen as being sought by the stronger and given by the weaker. In today's world it is important to recognise that sexual partners are each responsible for their own actions and that there should be parity of status.'<sup>34</sup> Yet even this is a rather negative approach to consent, in which partners bear an equal burden rather than sharing equal, positive desire.

Superficially at least, the law on sexual consent has come a long way since *Morgan*. The introduction of a statutory definition of consent as a gender-neutral, positive act rather than a woman's passive submission is a significant advance. However, the definition is broad and the key terms within it were not defined; as Ashworth and Temkin commented, 'freedom' and 'choice' are ideas which raise philosophical issues of such complexity as to be ill-suited to the needs of criminal justice'.<sup>35</sup> Munro has pointed out that 'we all operate with relative rather than

<sup>26</sup> See, e.g., Nicola Lacey, 'Beset by Boundaries' [2000] *Criminal Law Review* 3; Mary Heath and Ngaire Naffine, 'Men's Needs and Women's Desires: Feminist Dilemmas About Rape Law "Reform"' (1994) 3 *Australian Feminist Law Journal* 30 at 39-40, 51.

<sup>27</sup> Sexual Offences Review, *Setting the Boundaries* 2.13.

<sup>28</sup> *ibid* 0.11.

<sup>29</sup> Home Office, *Protecting the Public - Strengthening Protection against Sex Offenders and Reforming the Law on Sexual Offences* (London, HMSO, 2002) paras 33-34.

<sup>30</sup> House of Commons Home Affairs Committee, 'Sexual Offences Bill: Fifth Report of Session 2002-03' (2003) 8. For an overview of the legislative process, see Jennifer Temkin and Andrew Ashworth, 'The Sexual Offences Act 2003: (1) Rape, Sexual Assaults and the Problems of Consent' [2004] *Criminal Law Review* 328, 332-334.

<sup>31</sup> Offences against children are now separate (e.g. sections 9 to 15A), with absence of consent not part of their definition.

<sup>32</sup> Andrew Ashworth, *Principles of Criminal Law* (3<sup>rd</sup> ed, Oxford, Oxford University Press, 1999), pp. 354-5.

<sup>33</sup> Temkin and Ashworth, 'The Sexual Offences Act 2003' 341.

<sup>34</sup> Sexual Offences Review, *Setting the Boundaries* 2.10.3.

<sup>35</sup> Andrew Ashworth and Jennifer Temkin, 'The Sexual Offences Act 2003 (1): Rape, Sexual Assaults and the Problems of Consent' (2004) *Criminal Law Review* 328 at p 336.

complete sexual freedom', and section 74 tells us little about what *level* of freedom will suffice.<sup>36</sup> That has left a lot of room for interpretation not only by the courts, but also by the police and prosecutors who make decisions about whether an offence has occurred and, if it has, whether a criminal prosecution should be brought. Allowing such room for interpretation need not inevitably be a bad thing; after all, we now recognise that consent may be given or refused in a very wide range of situations. As Katerina Sjolín suggests, the courts value the flexibility it brings in 'an area of infinite variety and choice'.<sup>37</sup> Unfortunately, that flexibility comes at a cost since this is a field where the impact of cultural myths on all levels of the criminal justice system is profound, pervasive, and well-documented.<sup>38</sup>

In that context, misinterpretation is probable if not inevitable. 'Agreement', for example, had been suggested in *Setting the Boundaries* to recognise that 'sexual partners are each responsible for their own actions and that there should be parity of status.' Yet the report had immediately qualified this assertion by suggesting that the definition of 'consent' extended from 'enthusiastic agreement to reluctant acquiescence'.<sup>39</sup> In courtrooms, the latter suggestion has been seized upon so that 'agreement' is interpreted not as an equal meeting of minds but as a passive concession by one party to the other's active desire. Indeed, that is the approach suggested by the model direction for judges, which advises them to tell juries that '[c]onsent in some situations ... is given with reluctance, but it is still consent'.<sup>40</sup> It has been elaborated on in courtrooms: in *Bree* [2007] EWCA Crim 804, Judge P said that consent 'extends from passionate enthusiasm to reluctant or bored acquiescence'. Pitchford LJ in *Doyle* drew a distinction between:

... reluctant but free exercise of choice on the one hand, especially in the context of a long term and loving relationship, and unwilling submission to demand in fear of more adverse consequences from refusal on the other.<sup>41</sup>

Such an approach is not only a dilution of the model of free and active choice. It is also inherently gendered: there is a long history of the law understanding men as sexually-active seducers, women as the sexually-passive seduced. Women's own desires are downplayed or denied, while men are given considerable licence in their 'pursuit' and 'persuasion' of women into sexual activity. (And if this gendered understanding seems to render same-sex activity aberrant or invisible, that is because it does precisely that.) As Vanessa Munro has argued, the Act fails to recognise how 'entrenched power disparities, material inequalities, relational dynamics, and socio-sexual norms' constrain women's ability to freely say yes, as well as no, to sexual activity with men.<sup>42</sup>

The further provisions in sections 75 and 76 have done little to help courts in understanding what consent requires. Section 75 sets out a list of circumstances in which consent and reasonable belief in consent are presumed to be absent, although the defendant can put forward evidence that either or both were in fact present. While detailed consideration of these situations is outside the scope of this chapter, it is notable that they generally relate to circumstances where confusion around consent is unlikely in any event: for example, where

<sup>36</sup> Vanessa E Munro, 'An Unholy Trinity? Non-Consent, Coercion and Exploitation in Contemporary Legal Responses to Sexual Violence in England and Wales' (2010) 63 *Current Legal Problems* 45, 52.

<sup>37</sup> Catarina Sjolín, 'Ten years on: consent under the Sexual Offences Act 2003' [2015] *Journal of Criminal Law* 20 at 27.

<sup>38</sup> For recent discussions see Jennifer Temkin, Jacqueline M Gray and Jastine Barrett, 'Different Functions of Rape Myth Use in Court: Findings From a Trial Observation Study' (2016) *Feminist Criminology* 1; Katrin Hohl and Elisabeth Stanko, 'Complaints of rape and the criminal justice system: Fresh evidence on the attrition problem in England and Wales' (2015) 12(3) *European Journal of Criminology* 324.

<sup>39</sup> Sexual Offences Review, *Setting the Boundaries*, 2.10.3.

<sup>40</sup> Judicial College, *The Crown Court Compendium*, vol 1 (London, Judicial College, 2017) 20-17.

<sup>41</sup> *R v Doyle* [2010] EWCA Crim 119.

<sup>42</sup> Vanessa E Munro, 'Constructing Consent: Legislating Freedom and Legitimizing Constraint in the Expression of Sexual Autonomy' (2008) 41 *Akron Law Review* 923, 925.

there has been use of stupefying drugs, violence or threats of violence, or where the complainant was unconscious. Section 76 states that there is no consent or reasonable belief in consent where there has been deception either as to the defendant's identity or as to the nature or purpose of the act. It is narrow in scope (for example, the identity provision applies only where the defendant impersonated someone personally known to the complainant) and the courts have preferred to deal with most cases under section 74's general test instead. Combined with procedural issues in using these presumptions, they raise the question of whether there is now implicitly a hierarchy of consent, with cases outside the statutory scenarios somehow more borderline or less serious than those within.<sup>43</sup>

The superficial appeal of a simple statutory definition is thrown into question when it is applied to difficult cases. Before considering two situations which have generated controversial caselaw and important policy questions, it is worth considering a third type of scenario which has not been tested in the appeal courts. What if A does not want to engage in sexual activity with B, but agrees to do so in order to gain some benefit or avoid some disadvantage? For example, A performs fellatio on her husband B to avoid an argument in which he will get angry and verbally abusive. Or A performs fellatio on her manager B in order to gain a promotion. Or A performs fellatio on her manager B in order not to lose her job. Has A consented in any or all of these situations?<sup>44</sup> She has certainly not given enthusiastic consent; but that is not what the law requires. She did agree by choice in the most literal sense, but did she have 'freedom' in all three cases to make that choice? Which, if any, should be criminalised and why? It is not just that the dividing line between free consent and non-consent is difficult to draw precisely; there is not even agreement as to the broad neighbourhood within which that line should be drawn.

#### 4.1 Capacity and intoxication

While the courts have only considered whether there is 'freedom' in such scenarios briefly and hypothetically, they have had to engage in practice with the question of 'capacity' in the context of drunken consent. Since section 74 defines consent as requiring the capacity to make a choice, at what point will voluntary alcohol (or drug) consumption take away that capacity? If the complainant were wholly unconscious, then clearly there could be no consent (and indeed a section 75 presumption would apply). However, as the leading case of *Bree* acknowledged, 'capacity to consent may evaporate well before a complainant becomes unconscious'.<sup>45</sup> Yet determining when that point is reached has posed considerable difficulties. The practical problem of distinguishing between drunk-but-competent and conscious-but-incompetent is further complicated by two underlying ideas. One is that drunk complainants are contributorily negligent, an attitude now disavowed by the courts but still enjoying cultural currency.<sup>46</sup> The other is that criminalising sex with drunk women would be a paternalistic restriction of their sexual agency. The court in *Bree* expressed the latter point as a concern about 'patronising interference with the right of autonomous adults to make personal decisions for themselves'.<sup>47</sup> Unfortunately, in sidestepping the question of *when* intoxication undermines that autonomy, it left legal space for juries to draw upon the former idea.

<sup>43</sup> Temkin and Ashworth, 'The Sexual Offences Act 2003' 336.

<sup>44</sup> *Setting the Boundaries* suggested that there was no consent in the third situation but not the second (2.10.9). For further discussion of similar scenarios, see Susan Leahy, "'No Means No", But Where's the Force? Addressing the Challenges of Formally Recognising Non-Violent Sexual Coercion as a Serious Criminal Offence' (2014) 78 *Journal of Criminal Law* 309.

<sup>45</sup> *R v Bree* [2007] EWCA Crim 804 para 34. See further Phil Rumney and Rebecca Fenton, 'Intoxicated Consent in Rape: *Bree* and Juror Decision-Making' (2008) 71 *MLR* 279.

<sup>46</sup> Including among police officers: Kayleigh A Parratt and Afroditi Pina, 'From "Real Rape" to Real Justice: A Systematic Review of Police Officers' Rape Myth Beliefs' (2017) 34 *Aggression and Violent Behavior* 68. More generally, see Emily Finch and Vanessa E Munro, 'Breaking Boundaries? Sexual Consent in the Jury Room' (2006) 26 *Legal Studies* 303.

<sup>47</sup> At paragraph 35.



The courts have responded to the uncertainty by setting the bar for capacity surprisingly low, on somewhat questionable grounds. In an unreported 2005 case, a student so drunk that bar staff asked a security guard to escort her to her room remembered lying in the corridor while he had sex with her; her evidence was that she had not consented but could not remember the whole incident. However, the judge directed an acquittal without considering whether she had capacity, stating that ‘drunken consent is still consent.’<sup>48</sup> The teenage complainant in *H* was very intoxicated but, as Clare McGlynn has pointed out, prosecution witnesses and defence counsel suggested that she retained capacity to consent because she was still speaking and walking.<sup>49</sup> In *Bree* itself, the accused had looked after the complainant while she was repeatedly sick in the shower and sometimes unconscious. She woke up later to find he was having sex with her. Because the trial judge offered no specific guidance on the effect of intoxication upon consent, the Court of Appeal quashed the conviction. Nonetheless, rather than offering its own guidelines, the appeal court insisted that section 74 ‘sufficiently addresses the issue of consent in the context of voluntary consumption of alcohol by the complainant’ through its reference to capacity.<sup>50</sup> Jury guidance is to depend upon the facts of the case, offering a level of discretion to judges which may cause concern. The Court of Appeal itself worryingly suggested that consent encompasses ‘reluctant or bored acquiescence’.<sup>51</sup> It also drew an analogy between intoxicated complainants and intoxicated defendants which ignored that consent can, as we have seen, be passive while intention is an active state of mind related to physical actions. The comparison also appears to reintroduce the inappropriate notion of defendants’ responsibility for their actions being mitigated by victims’ ‘contributory negligence’.<sup>52</sup>

## 4.2 Freedom, fraud, and common sense

In the subsequent case of *Kamki*, the Court of Appeal approved the trial judge’s direction inviting the jury to use ‘common sense’.<sup>53</sup> Common sense might seem a sensible basis for a jury decision: it is something which the courts assume that jurors understand and are able to apply. However, common sense is in reality far from neutral, and at its worst can be a euphemism for bias or prejudice. More generally, it involves an implicit appeal to gender norms; in many of the reported cases, it is grounded in stereotypical expectations of young women’s behaviour. It is therefore both unsurprising and of great concern that this term is also central to the courts’ approach to fraudulent consent. Acknowledging the difficulties this area raises, Leveson LJ nonetheless asserted in *McNally* that ‘the route through the dilemma’ was to approach it in ‘a broad commonsense way’.<sup>54</sup> The results are profoundly problematic. Put simply, if I mislead someone into thinking I have male genitals when I do not, then their consent to sexual activity (even if it does not involve my genitals) is likely to be legally void; but if I am an undercover state agent who lies about my job, politics, age, personal and marital situation, and motives for associating with the complainant, their consent is nonetheless valid.

In the latter situation, prosecutors have not even brought the cases before the criminal courts. That is despite some of the relationships lasting for a number of years and resulting in the

<sup>48</sup> *R v Dougal* (Swansea Crown Court, unreported; *Guardian*, 24 November 2005).

<sup>49</sup> *R v H* [2007] EWCA Crim 2056; Clare McGlynn, ‘Feminist Activism and Rape Law Reform in England and Wales: A Sisyphean Struggle?’ in Clare McGlynn and Vanessa Munro (eds), *Rethinking Rape Law: international and comparative perspectives* (London, Routledge, 2010) 149.

<sup>50</sup> Paragraph 36.

<sup>51</sup> Paragraph 22.

<sup>52</sup> Shlomit Wallerstein, ‘“A drunken consent is still consent” – or is it? A critical analysis of the law on a drunken consent to sex following *Bree*’ [2009] *Journal of Criminal Law* 318, 323-329; Temkin and Ashworth, ‘The Sexual Offences Act 2003’.

<sup>53</sup> *R v Kamki* [2013] EWCA Crim 2335. For juror ‘common sense’ and capacity, see E. Finch and V. E. Munro, ‘Breaking Boundaries? Sexual Consent in the Jury Room’ (2006) 26 *Legal Studies* 303, 314-315.

<sup>54</sup> *McNally v R* [2013] EWCA Crim 1051.

birth of children;<sup>55</sup> one allegedly ended only when the woman escaped to a refuge.<sup>56</sup> However, a judicial review of the decision not to prosecute the police officer concerned was brought by one of the deceived women.<sup>57</sup> Known as 'Monica', she was one of a number of women political activists who had relationships with men they subsequently discovered to be undercover police officers. In 1997 Monica, an environmental activist, had had a six-month relationship with a fellow member of 'Reclaim the Streets' and hunt saboteur, Jim Sutton. Only in 2011 did she find out that he was in fact DC Andrew Boyling. Monica emphasised that had she been aware of that, she would not have entered into the relationship. Nonetheless, the High Court accepted that there was valid consent since the deception was not sufficiently 'closely connected to the performance of the sexual act'.<sup>58</sup>

Other situations have been recognised as criminal only where highly coercive in nature. Thus in *Jheeta*, the court distinguished the defendant's elaborate deception from 'common or garden lies'<sup>59</sup> primarily because it involved a threat of criminal prosecution if the complainant did not have sex with the defendant. A later case, *Devonald*,<sup>60</sup> suggested a broader approach, but was disapproved in *Bingham*.<sup>61</sup> *Devonald* had impersonated a young woman online in order to get his daughter's ex-boyfriend to masturbate in front of a webcam; the Court of Appeal accepted that there had been deception as to the purpose of the act (revenge rather than sexual gratification). *Bingham* undertook a similar kind of deception, impersonating other men online in order to get his girlfriend to pose topless, then using the recordings to blackmail her into performing sexual acts on webcam. However, the Court of Appeal now held that it did not fall within section 76 as sexual gratification might also have been one of the purposes, even if not the main one. Hallet LJ was concerned to limit the scope of section 76 because, as it conclusively presumed a lack both of consent and of reasonable belief in consent, it 'removes from an accused his only line of defence'.<sup>62</sup> The issue of consent was therefore to be considered under the general definition in section 74.

By contrast, where there has been deception as to gender, prosecutions and convictions have followed.<sup>63</sup> The Court of Appeal considered the legal issues in *McNally* and concluded that it was clearly 'common sense' that deception as to gender must vitiate consent while other identity deceptions would not.<sup>64</sup> By labelling it a matter of common sense, the court ensured that this reasoning did not have to be explained. They might have found some difficulty in doing so. For example, why was it obvious that gender fraud vitiated consent to digital penetration (as occurred in *McNally*)? Why are female fingers so fundamentally different to male fingers that an extremely serious offence is committed, while the fingers of a deceptive police officer are so similar to those of an honest activist and political comrade that no offence occurs at all? In either case, the physical act is the same and uses the same body parts; the difference is the person to whom those body parts are attached. The emotional effects upon the complainant is similar in each case, although compounded in the latter by state collusion.

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<sup>55</sup> Carole McCartney and Natalie Wortley, 'Under the Covers: Covert Policing and Intimate Relationships' [2018] *Criminal Law Review* 137.

<sup>56</sup> McCartney and Wortley, 'Under the Covers' 150.

<sup>57</sup> *R (on the application of 'Monica') v Director of Public Prosecutions* [2018] EWHC 3469 (QB).

<sup>58</sup> At para 80. Although the pre-2003 law applied to *Monica*, the Court of Appeal also considered what the position would be under the current law. The use of undercover policing, including the issues raised by these relationships, is at the time of writing the subject of the Undercover Policing Inquiry (<https://www.ucpi.org.uk/>).

<sup>59</sup> *R v Jheeta* [2007] EWCA Crim 1699, paras 23-24.

<sup>60</sup> *R v Devonald* [2008] EWCA Crim 527.

<sup>61</sup> *R v Bingham* [2013] EWCA Crim 823.

<sup>62</sup> Para 20.

<sup>63</sup> As well as *McNally* (below) and *Gayle Newland* [2016] All ER (D) 85, there were gender deception convictions in the unreported cases of *Gemma Barker* (5 March 2012, Guildford Crown Court), *Kyran Lee (Mason)* (16 December 2015, Lincoln Crown Court), and *Jennifer Staines* (24 March 2016, Bristol Crown Court).

<sup>64</sup> *R v McNally (Justine)* [2013] EWCA Crim 1051.

*Monica* and *McNally* mean that someone who engaged in sexual activity with a 'man' who was anatomically a woman is likely to be considered the victim of a crime, yet someone who engaged in sexual activity with a fellow activist who was actually a police spy will not. To reach this result, the courts import a number of gendered assumptions into their 'common sense' interpretation of the facts. These assumptions include that normative heterosexual sex is intrinsically more desirable than sex with a trans person or someone of the same sex: kissing a woman whom one believes is a man is unthinkable to the courts, yet kissing a poor man who has lied thoroughly enough about enough aspects of their life to convince their partner that they are wealthy is not. Belying the apparent gender neutrality of current sexual offences law, this approach also assumes that there is a male prerogative – not acquired by trans men – to enjoy considerable latitude in 'seduction', which can encompass serious lies about their identity and beliefs.

A shift of perspective would profoundly alter the legal outcomes. It would not gloss over men's culpability in favour of requiring women to establish that they suffered coercion exceeding those prerogatives. What happens if we do not take masculine deception as a given in sexual relationships, but instead ask whether there is justification for the deceit? As Amanda Clough points out, '[i]t is for the accused's gain, and only their gain, if the reason for non-disclosure is that they are fully aware that the victim would be unlikely to consent if they knew the truth.'<sup>65</sup> That would mean there would be no legally valid consent in many undercover policing cases,<sup>66</sup> but would prompt more nuanced considerations in those gender fraud cases where the defendant was confused or conflicted about their gender or was trans. In other words, it could significantly shift the current legal 'common sense'.

Finally, the mens rea requirement of a lack of 'reasonable belief' in consent allows a further opportunity for bias, norms and assumptions to be imported into the process of determining guilt. The jury is allowed a wide margin of discretion not only in assessing what is 'reasonable', but also through the statute's invitation to do so in 'all the circumstances'. Rape myths continue to influence jurors, and that poses dangers which begin long before a case reaches the courtroom. In assessing its credibility and prospects of success, the police and Crown Prosecution Service attempt to predict the reactions of jurors to the evidence. In doing so, they are likely to draw upon not only the likely biases of jurors but also their own. Common sense and resort to the reasonable person, then, work hand in hand with the other flaws in the criminal justice system to ensure that rates of prosecution and conviction for sexual offences remain troublingly low.<sup>67</sup>

## 5. Is consent adequate at all?

Underlying these issues is the question of whether consent is an adequate or appropriate concept for establishing the borderline between lawful and criminal sexual acts. For some commentators including Jonathan Herring it could be, but we need 'a rich sense' of what it means.<sup>68</sup> He argues that a person mistaken about a fact who would not have consented had she known the truth does not in fact consent. If the accused knew or ought to have known that

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<sup>65</sup> Amanda Clough, 'Conditional Consent and Purposeful Deception' (2018) 82 *Journal of Criminal Law* 178, 186.

<sup>66</sup> At the time of writing, the Covert Human Intelligence Sources (Criminal Conduct) Bill is before Parliament. It would allow intelligence sources including police officers to be authorised to commit crimes including sexual offences. Thus, this issue may at first glance appear potentially redundant; on the contrary, it will be equally if not more important should the Bill become law in order to ensure that proper scrutiny and formal authorisation are required before such sexual conduct can take place.

<sup>67</sup> There is an extensive literature on the shortcomings of the criminal justice system in relation to sexual offences: for a comprehensive examination, most of which remains sadly pertinent, see Liz Kelly, J Lovett and L Regan, 'A Gap or a Chasm? Attrition in Reported Rape Cases' (2005). For mock jury research showing the continuing expectation of violent force, resistance, and physical injuries, see Louise Ellison and Vanessa E Munro, 'Better the Devil You Know? "Real Rape" Stereotypes and the Relevance of a Previous Relationship in (Mock) Juror Deliberations' (2013) 17 *Evidence & Proof* 299.

<sup>68</sup> J. Herring, 'Mistaken Sex' [2005] *Crim LR* 511.

she did not consent, then an offence has been committed. The latter element makes Herring's interpretation less drastic than some critics have argued, since the (perhaps idiosyncratic) priorities of the complainant do not alone determine liability. The accused must either have actually known, or ought to have known, that consent depended upon the particular issue, but chosen to deceive her anyway. That objective standard is unlikely to be reached if a condition was both undisclosed and unusual. However, while it gives greater protection to people's autonomy, it does not fully resolve the issues around fraudulent consent. In particular, the assumption that an accused ought to have known their genital sex was determinative of consent is already at the heart of cases such as *McNally*. A richer understanding could, though, return attention to the deceptions which arguably most concerned the complainants in the gender fraud cases: not the gender of their partner so much as the prolonged deceptions about their identity or identities and the many details of their lives and personalities which were deliberately misrepresented. In another gender fraud case, for example, the accused was originally reported to police not because of deception as to gender (which had not yet been discovered) but because they had pretended to be three or more different people including the boyfriends of both her and her best friend.<sup>69</sup>

Others suggest that consent is not wrongly defined but fundamentally inadequate.<sup>70</sup> In terms of its practical operation, it is criticised for focusing attention upon the behaviour of the complainant rather than the accused. Did she act in ways which might have implied that she did consent? Did she adequately convey her lack of consent? While the semi-objective mens rea now limits the assumptions a defendant can legitimately make, it by no means eliminates them. He can still rely upon a mistaken belief as long as it is deemed to be reasonable in all the circumstances – and those circumstances presumably include the conduct of the complainant.<sup>71</sup>

However, the issues are also more fundamental. For Catherine MacKinnon, consent-based offences falsely assume a social context in which women have equality of power and free exercise of choice, when in reality there is an 'underlying structure of constraint and disparity'.<sup>72</sup> Its equation of apparent consent with an exercise of autonomy is therefore false: too often, women's apparent consent is rather submission for the sake of survival.<sup>73</sup> We have seen that impoverished version of consent accepted by the criminal courts as adequate for women in cases such as *Bree*. Given their attachment to this model, would they really be able to implement a more radical and demanding model of free agreement?

John Gardner makes the opposite argument: that consent *necessarily* presupposes asymmetry between the (male) doer and (female) sufferer.<sup>74</sup> It therefore does not encompass agreement or teamwork as a model for sex. In other words, the notion of consent is incompatible with full sexual autonomy for women. Yet, while that is indeed the current model of consent, need it be the case? Or is mutual consent a possibility? If so, we return to the question: is it one which the law is able to accommodate? We might point to other fields of law to suggest that an asymmetrical model is not inevitable: contract law, for example, requires offer and acceptance. Yet the very fact that these are complicated by recognition of counter-offers, invitations to treat, and so forth shows that the roles of offeror and acceptor are neither

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<sup>69</sup> Gemma Barker. See further Caroline Derry, *Lesbianism and the Criminal Law: Three centuries of regulation in England and Wales* (Basingstoke, Palgrave, 2020) chapter 8.

<sup>70</sup> For an overview of the key challenges to liberal conceptions of consent, see Munro, 'Constructing Consent' pt II.

<sup>71</sup> Temkin and Ashworth, 'The Sexual Offences Act 2003' 341.

<sup>72</sup> Catherine Mackinnon, *Towards a Feminist Theory of the State* (Cambridge MA, Harvard University Press, 1989) 175.

<sup>73</sup> Mackinnon, *Towards a Feminist Theory*, 168.

<sup>74</sup> John Gardner, 'The Opposite of Rape' (2018) 38 *Oxford Journal of Legal Studies* 48.

fixed and binary, nor readily mapped onto active and passive roles. Unfortunately, the criminal law shows little willingness to discard its binary assumptions in relation to sexual consent.

Hunter and Cowan summarise critiques of consent's inability to recognise women's agency from several angles. On one hand, women may be treated as irrational victims: their autonomy and decision-making capacity is not recognised so their (non-)consent is not respected. On the other, women may be treated as masculine, atomised subjects with no account taken of the structural inequalities which limit their autonomy and decision-making capacity: constraints on their ability to (not) consent are then not recognised. In other words, liberal notions of consent may tie women into the roles of victim or agent, with little space for intermediate positions.<sup>75</sup> The problem is not simply this imposition of a victim/subject binary. As Louise du Toit points out, the underlying issue is liberalism's model of the self as 'pre-existent and complete' rather than 'dynamic and intersubjective'.<sup>76</sup> In other words, we form our sense of self through time and through our interactions with others: the law both fails to understand that when considering consent and does not take seriously the damage rape does to that process of forming sexual selfhood. It will remain unable to do so, du Toit argues, since the asymmetry between the active male and passive female – and the notion of women's sexuality as men's property – are so entrenched in criminal law.<sup>77</sup>

However, if consent is inadequate, does that mean we should abandon it?<sup>78</sup> If so, what should take its place? There is no consensus on what an alternative might look like. One ambitious possibility is du Toit's suggestion that we need to resymbolise 'feminine sexuality as inappropriatable, inviolable'. That would involve, among other measures, reminding judges and juries about women's struggles to maintain sexual agency and ensuring they understand the damage rape does to the victim's dynamic selfhood.<sup>79</sup> But are such proposals too utopian in a system where even cautious changes have been undermined and resisted by the criminal justice system?

Conversely, other critics of consent move in the opposite direction to suggest that we should move back towards a requirement of force. Victor Tadros argued in 'Rape Without Consent' that the consent requirement fails to mark rape as a crime of violence.<sup>80</sup> For him, the answer is a differentiated definition which, rather than centring on consent, focuses upon the particular wrong done. For example, he suggests that where force is used, it is 'a significant feature of the wrong perpetrated'.<sup>81</sup> That would seem to further imply a relatively high degree of force would be required; while it is not clear what other circumstances would be classed as rape under this scheme, there are strong echoes of the Victorian 'force fear or fraud' albeit that he also mentions some other situations such as unconsciousness and involuntary intoxication. How, without a single underpinning concept, is such a scheme to avoid being under-inclusive? In other words, removing the difficulties in this area of sexual offences law is unlikely to be as simple as removing the element of consent.

## 6. Conclusion

The past half century has seen a transformation in sexual offences law. Both the fact of consent and the accused's belief in consent have been given new statutory definitions which aim to address at least the most egregious failings of the old law. To some extent, they have

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<sup>75</sup> Rosemary Hunter and Sharon Cowan, 'Introduction' in Rosemary Hunter and Sharon Cowan (eds), *Choice and Consent: Feminist engagements with law and subjectivity* (London, Routledge-Cavendish, 2007).

<sup>76</sup> Louise du Toit, 'The Conditions of Consent' in Rosemary Hunter and Sharon Cowan (eds), *Choice and Consent: Feminist engagements with law and subjectivity* (London, Routledge-Cavendish, 2007).

<sup>77</sup> du Toit, 'The Conditions of Consent' 68.

<sup>78</sup> Victor Tadros, for example, makes this argument in 'Rape Without Consent' (2006) 26(3) *Oxford Journal of Legal Studies* 515.

<sup>79</sup> du Toit, 'The Conditions of Consent' 70–71.

<sup>80</sup> Tadros, 'Rape Without Consent' 515–516.

<sup>81</sup> Tadros, 'Rape Without Consent' 539.

succeeded in this. The *Morgan* defence would no longer be arguable; nor would *Olugboja*'s defence argument that failure to physically resist legally equated to consent. Section 74 of the Sexual Offences Act 2003 put that changing understanding on a statutory footing. It seems evident that in law, consent requires something more than a mere absence of resistance.

Yet there has been little sign of a corresponding transformation in the implementation of those definitions. Successful prosecutions remain more likely where there is evidence of the use of force.<sup>82</sup> The acceptance that a woman who is vomiting in a shower, or so intoxicated that she cannot be allowed to walk through campus alone, can 'agree by choice' shows that the courts' understanding of positive consent is a weak and thin one. It is partly for this reason that Vanessa Munro has argued that the force requirement has not disappeared; although no longer part of the legal definition of rape, its use is important evidence to support a woman's allegation.<sup>83</sup> Men's prerogative to 'seduce' extends to police spies who lied about every aspect of who and what they were, in the context of long-term relationships; yet the courts have been eager to take punitive action against (presumed) women who attempt to exercise similar prerogatives. It is difficult, then, to avoid the conclusion that while feminist activism helped to inform statutory change, similar transformations of understanding remain elusive in the police stations, prosecution offices, and courtrooms of England and Wales.<sup>84</sup>

Should feminists disengage from law reform altogether? Rather, Larcombe argues that we should work towards qualitative, victim-centred aims. One of these, 'improving the legal 'story' of rape' so that myths and stereotypes are not reinforced by the legal system,<sup>85</sup> will require the issues around consent considered in this chapter to be addressed in a way which the law has not yet achieved. The experience of the last fifty years demonstrates that changing the legal story is a slow and difficult process, which cannot be achieved by statutory reform alone. Yet it is essential if the law is to truly recognise the sexual agency of all those it governs. At present, it only fully recognises the sexual agency of heterosexual men, which leaves the rest of us with little role beyond accepting or refusing their demands. In order to transform that, we must continue to effect change 'slowly, and often imperceptibly',<sup>86</sup> until the courts embrace 'agreement by choice' as a *mutual* agreement between equals rather than the reaction of the sexually passive to a binary choice between submission and resistance.

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<sup>82</sup> Munro, 'Constructing Consent'.

<sup>83</sup> Munro, 'An Unholy Trinity?'

<sup>84</sup> Sjolín ('Ten Years On') suggests that to criticise the courts for 'harking back' is 'a lazy criticism' and that instead, they are avoiding interference with the statutory definition and preserving flexibility. However, the cases discussed here do not wholly bear out that more generous interpretation: the judicial approach combines with police, CPS, and jury attitudes to ensure that older understandings of consent persist.

<sup>85</sup> Larcombe, 'Falling Rape Conviction Rates' 39.

<sup>86</sup> McGlynn, 'Feminist Activism' 150.